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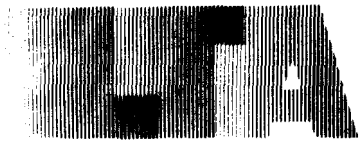

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March 18, 1996

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

William F. Caton
Secretary
Federal Communications Commission
1919 M Street, NW
Washington, DC 20554

Re: Ex Parte Presentation of Primosphere Limited Partnership in IB Docket No. 95-91

Primosphere Limited Partnership, pursuant to Section 1.1206(a)(2) of the Commission's rules, hereby provides notice of a permitted ex parte presentation to Commission officials concerning IB Docket 95-91. On behalf of Primosphere, Howard M. Liberman (of the law firm of Arter & Hadden) and I met with Christopher J. Wright, Deputy General Counsel, Peter A. Tenhula, of the Office of General Counsel, and John Stern, of the Office of General Counsel on March 14, 1996. The following paragraphs summarize our presentation to those officials.

Primosphere remains firm in its conviction that the Commission may not legally auction SDARS licenses. As mentioned in the ex parte meeting, and as verified by the Joint Comments of the DARS Applicants submitted September 15, 1995, the four pending applicants are not mutually exclusive. Although there are various methods by which mutual exclusivity could be manufactured, none of these methods is supported by the record and none could withstand judicial scrutiny. The list below summarizes the various methods discussed in our meeting and the reasons these options are not consistent with the law.

1. Re-opening the Cut-off

- The initial cut-off was valid.

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• The Commission only re-opens cut-offs in extreme circumstances.[1] This is not such a circumstance. PanAmSat and State of Oregon both involved denials of waiver requests to entities that had *actually filed* applications. Here, no entity has filed a competing application.

• No entity has indicated that it has an application ready and is being prevented from filing. Cracker Barrel has asked that the cut-off be reopened, but provided no legal basis for doing so. It claimed only that there was nothing stopping the Commission from doing so (which, as the comments of the SDARS applicants showed, is inaccurate). Cracker Barrel, though, has failed to explain why it did not meet the original cut-off. It has also shown none of the due diligence that State of Oregon requires of an applicant requesting a waiver of the cut-off rules.

2. Reserving Spectrum

• The Commission has allocated the 2310 - 2360 MHz band to SDARS.[2] The pending applicants have adopted a sharing plan and demonstrated a need for the available spectrum. There are no competing demands for the spectrum that would warrant reserving it.

• There is nothing in the record to support not licensing the whole 50 MHz. Reserving spectrum would be unprecedented.

• The Commission cannot reserve spectrum to accommodate new applicants. The Commission has no reason to believe there are new applicants and the cut-off has already passed. There is nothing in the record to indicate that the current pool of applicants is technically deficient, that others were deprived a chance to meet the earlier cut-off, or that four SDARS operators are insufficient to support robust competition.

• Reserving spectrum would be a transparent attempt to create mutual exclusivity. Section 309(j)(6)(E) requires the Commission to *avoid* mutual exclusivity, not to actively create it.

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[1] See In re: Petition of PanAmSat Licensee Corp., DA 96-178 (released February 21, 1996) at ¶ 14; In re: Application of the State of Oregon, FCC 95-464 (released January 18, 1996) at ¶ 11.

[2] SDARS Allocation Order, 10 FCC Rcd 2309 (1995).

3. Reserving Spectrum to Facilitate Coordination with Canada

• Commission has previously held that the reasons behind Resolution 528 (limiting allocations for BSS (Sound) to the upper 25 MHz of the 2310 - 2350 MHz band) "do not obtain in the present circumstances."[3] The Order goes on to state that "we believe that no purpose would be served in imposing a limit on the use of the DARS allocation at this time."[4] Ruling otherwise would be a radical policy diversion which the Commission would be hard-pressed to justify.

• The potential impact on Canadian systems is no greater than that typically encountered in satellite coordination. There is no evidence in the record that a reduction in the allocation is needed to facilitate coordination. The report on which the Commission relies in the NPRM for suggesting there was a problem with Canada was clarified to indicate that coordination is *not* a problem. CD Radio indicates that only 2 of the ~200 potential fixed Canadian receivers might be interfered with.[5] It would be bizarre for the Commission to abdicate 10 MHz of spectrum *ab initio* to avoid the potential for interference into a small number of Canadian fixed stations before coordination and mitigation is attempted.

• The US should try adjusting pfd limits or using other mitigation techniques before abdicating spectrum. The cost to U.S. consumers in lost potential SDARS channels is not warranted yet, when coordination efforts have not even proceeded.

• Withdrawing 10 MHz of spectrum and allowing it to lie fallow would be contrary to long-standing Commission policy. The spectrum would have to lie fallow if withdrawn under the pretext of facilitating coordination, since it is allocated for SDARS and cannot be used by other services.

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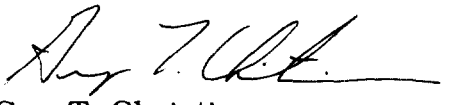
[3] SDARS Allocation Order, 10 FCC Rcd 2309 (1995) at ¶27.

[4] Id.

[5] CD Radio Comments at 12 and appended statement of Robert Briskman.

Copies of this letter are being sent to Mr. Wright, Mr. Tenhula and Mr. Stern concurrent with this filing.

Respectfully submitted,



Guy T. Christiansen